IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

AMERICAN TEXTILE MANUFACTURERS INSTITUTE, INC., MILLIKEN & COMPANY, ARKWRIGHT MILLS, SPARTAN MILLS, BLAIR MILLS, INC., HERMITAGE, INC., DAN RIVER, INC., CONE MILLS CORPORATION, MAYFAIR MILLS, SPRING MILLS, INC., RIEGEL TEXTILE CORPORATION, FIELDCREST MILLS, INC., and WEST POINT-PEPPERELL, INC.,
Petitioners,

v.

RAY MARSHALL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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MOTION OF AMERICAN IRON AND STEEL INSTITUTE FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

and

BRIEF OF AMERICAN IRON AND STEEL INSTITUTE *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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The American Iron and Steel Institute, a nonprofit trade association with a membership which includes 63 domestic iron and steel producing companies, moves for leave to file a brief, amicus curiae, in support of

the petitioners. This motion is accompanied by the written consent of the Solicitor General for the respondents and by the written consents of some of the petitioners. While counsel for each of the petitioners have orally consented to the filing of this brief, written consents have not been received from all of the petitioners.

As set forth more fully in the attached brief, the American Iron and Steel Institute's interest arises from the fact that the American steel industry, unlike the petitioners in this case, is substantially affected by numerous OSHA health and safety regulations pursuant to § 6(b) of the OSH Act. In the light of the economic problems now facing the basic steel industry, this Court's application and interpretation of the terms "to the extent feasible" and "the feasibility of the standards" in § 6(b)(5) of the OSH Act, 29 U.S.C. 655(b)(5), and "reasonably necessary or appropriate" in § 3(8) of that Act, 29 U.S.C. 652(8), are crucial to the industry. The parties are unlikely to present to this Court the effect its interpretation of these statutory terms will have on an industry subject to numerous OSHA regulations.

Respectfully submitted,

DAVID FERBER

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STATEMENT OF INTEREST OF AMERICAN IRON AND STEEL INSTITUTE *AMICUS CURIAE*

American Iron and Steel Institute (AISI) is a non-profit trade association with a membership that includes sixty-three domestic iron and steel producing companies. These companies employ some 449,000 persons in their steel producing and fabricating operations and possess approximately 92% of the raw steel producing capability in the United States. AISI is participating in rulemaking and litigation concerning the standard proposed by the Occupational Safety and Health Administration (OSHA) for occupational exposure to lead because that standard has had and will continue to have a direct impact on certain steel industry operations. AISI's interest in the instant case stems from the consonance of legal issues presented in the cotton-dust and lead-standard litigations and the potential precedential effect of this litigation on the interpretation and application of the Occupational Safety and Health Act (OSH Act) generally.

Crucial to the American iron and steel industry will be this Court's application and interpretation of the terms "to the extent feasible" and "the feasibility of the standards" in § 6(b)(5) of the OSH Act, 29 U.S.C. 655(b)(5), and "reasonably necessary or appropriate" in § 3(8) of that Act, 29 U.S.C. 652(8). If the view of the court below should be sustained that these terms require no more of OSHA than a determination that the costs of the standard will not bankrupt the regulated industry, the American steel industry will be dealt a severe blow. This is because the steel industry is or expects to be subject to numerous OSHA health and safety regulations promulgated pursuant to § 6

(b),[1] including those dealing with coke oven emissions,[2] asbestos,[3] noise,[4] benzene,[5] lead,[6] carbon monoxide (CO),[7] sulphur dioxide (SO_2),[8] heat stress,[9] iron oxide,[10] benzo (a)pyrene,[11] naphthylamine,[12] and trichloroethlene,[13] all of which are expected materially to affect the manufacture of steel or subsidiary operations. Also, of concern to the steel industry are current OSHA standards adopted pursuant to § 6(a), to which the "reasonably necessary or appropriate" language of § 3(8) seems equally applicable. These include various of the subjects as to which § 6(b) stand-

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[1] § 6(b)(5) of the OSH Act containing the "feasibility" language clearly covers health standards and may also cover safety standards. See *Industrial Union Dept. AFL-CIO* v. *American Petroleum Institute,* 48 USLW 5022, 5023, n. 1 (July 2, 1980) (*Benzene*).

[2] 29 CFR 1910.1029 (1977).

[3] 29 CFR 1910.1001 (1976), 45 Fed. Reg. 36971 (1980).

[4] 29 CFR 1910.95 (1974), 45 Fed. Reg. 36962 (1980).

[5] 29 CFR 1910.1026 (1978), invalidated by *Industrial Union Department, AFL-CIO* v. *American Petroleum Institute,* 48 USLW 5022 (July 2, 1980).

[6] 29 CFR 1910.1025 (1979), 45 Fed. Reg. 63476 (1980).

[7] 29 CFR 1910.1000, Table Z-1, 45 Fed. Reg. 37648 (1980).

[8] 45 Fed. Reg. 37649 (1980).

[9] Registry of Toxic Effects of Chemical Substances NIOSH, as contained in the Environmental Protection Agency National Institutes of Health Chemical Information System (July, 1979), referred to at 45 Fed. Reg. 53673 (1980).

[10] Id.

[11] Environmental Protection Agency's Carcinogen Assessment Group "List of Carcinogens," April 22, 1980, referred to at 45 Fed. Reg. 53673 (1980).

[12] Id.

[13] Id.

ards are anticipated, such as exposure to noise,[14] carbon monoxide,[15] sulphur dioxide,[16] electrical standards,[17] and standards respecting walking and working surfaces,[18] as well as other possible hazards, such as exposure to acid mist,[19] coal dust,[20] and dusts (total).[21] The § 6(b) standards, as adopted or proposed, are almost uniformly more expensive for the industry than the "consensus" or "established Federal" safety and health standards with respect to the same subject matters that have been previously adopted by OSHA pursuant to § 6(a) of the OSH Act, although the latter standards have resulted in substantial compliance costs.

At the same time the industry is subjected to these heavy expenses of compliance with OSHA regulations, it is subject to the burdensome costs of complying with the Clean Air Act, 42 U.S.C. § 7401 *et seq.*, and the Clean Water Act, 33 U.S.C. § 1251, *et seq.*, as well as to numerous other Federal regulations. By reason of such regulations, the Council on Wage and Price Stability reported:

> "Steel is an industry whose production procedures are to some extent prescribed for it by government, whose costs are substantially influenced by government, whose market share exists at the sufferance of government and whose profitability

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[14] 29 CFR 1910.95 (1974), 45 Fed. Reg. 36962 (1980).

[15] 29 CFR 1910.1000 Table Z-1.

[16] Id.

[17] 29 CFR 1910.308-309, 45 Fed. Reg. 37648 (1980).

[18] 29 CFR 1910.21-34, 45 Fed. Reg. 37648 (1980).

[19] 29 CFR 1910.1000 Table Z-1.

[20] Id. at Table Z-2.

[21] Id. at Table Z-3.

> has a good deal less to do with innovation and enterprise than it does with what government decides to let it keep."[22]

Over the past several years, the basic American steel industry has been characterized by production far below capability, by low or negative rates of return, and by declining employment. During the most recent four calender quarters for which data is available, the second quarter of 1979 to the second quarter of 1980, the major integrated steel producers suffered a decline of 63% in corporate profits, with outright losses in steelmaking operations as a result of escalating costs and underutilization of facilities.[23] From 1970 to 1979 employment by American companies in the production and sale of steel products declined by 15%, from 531,000 to 453,000.[24] Not coincidently, imports of steel have increased both absolutely and proportionately during the past three decades. In the early 1950s steel imports represented 1.8% of domestic sales; by 1978 that figure had grown ten-fold to 18.1%.[25]

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[22] Council on Wage and Price Stability, *Catalog of Federal Regulations Affecting Iron and Steel Industry*, December, 1976, at iv.

[23] *Report to the President by the Steel Tripartite Advisory Committee on the U.S. Steel Industry*, (Sept. 24, 1980) at 1. Co-chaired by the Secretaries of Labor and Commerce and comprised of government, labor, and industry leaders, the Steel Triparitite Advisory Committee submitted findings on the steel industry and recommendations for its revitalization to President Carter. These recommendations provided the basis for President Carter's program for the industry, announced on September 30, 1980.

[24] Annual Statistical Report, AMERICAN IRON AND STEEL INSTITUTE 1979, p. 21.

[25] *American Iron and Steel Institute, Steel at the Crossroads: The American Steel Industry in the 1980s* (Jan. 1980) (hereinafter "Steel at Crossroads") at 9.

Modernization of facilities is the key to the industry's recovery but this will require enormous capital expenditures over the next five years. The Steel Tripartite Committee has examined this matter and has concluded that when the industry's capital needs for modernization and for meeting environmental and health requirements are compared to available capital resources for the critical 1980-84 period a shortfall of 1.7 to 2 billion dollars annually results.[26]

It must be added that the economic problems confronting the steel industry and inflation and persistent balance of payments deficits, among other things, bear testimony to a malaise in the American economy in general and in basic industries in particular. It is against this economic backdrop that OSHA's cotton dust standard—and specifically the agency's treatment of the economic feasibility issue—must be judged.

AISI's participation in the on-going proceedings to establish a health standard for occupational exposure to inorganic lead has served to focus the steel industry's attention on the legal issues presented to this Court in the instant case. In the lead standard proceeding OSHA, with approval of the Court of Appeals of the District of Columbia Circuit,[27] has determined among other things that it has the power under § 6 (b)(5) of the Act to force whole industries to convert their basic manufacturing facilities from traditional to novel and untried technologies because the latter

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[26] This estimate represents a consensus reached with Treasury Department representatives on the Steel Tripartite Advisory Committee. STC Report at 8. Industry estimates of the capital shortfall are in fact somewhat larger. See *Steel at the Crossroads, supra,* at 50.

[27] *United Steelworkers of America, AFL-CIO* v. *Marshall,* No. 79-1048 (D.C. Cir. Aug. 15, 1980) (*Lead*).

may, in OSHA's view, achieve some health gains for employees. OSHA further concluded, again with the approval of the Court of Appeals, that the unknown but unquestionably vast dollar expenditures required to effect these changes in fundamental technology and manufacturing processes did not render the standard economically infeasible because, as here, it did not appear that the costs imposed by the standard would bankrupt the affected industries.

While Certiorari will be sought in *Lead*, this Court's disposition of this case may establish precedents which both will affect the disposition of some of the issues in *Lead* and will resolve critical questions concerning the meaning and application of the OSH Act generally. For the reasons already indicated and developed further herein, the proper resolution of these questions here is a matter of the gravest concern to the American steel industry.

SUMMARY OF ARGUMENT

The criteria applied by OSHA and the court below to determine that the cotton dust standard is economically feasible are clearly inadequate. They confer on OSHA an unfettered power to impose costs on affected industries and to direct the allocation of their capital resources without regard to the realities of today's economy. In so doing, they inescapably raise grave questions of unconstitutional delegation of legislative power. The constitutional questions can be avoided and the American economy can be spared the imposition of unnecessary costs by a reading of the OSH Act which compels OSHA to justify the costs of its standards.

ARGUMENT

In the language of the Court of Appeals, OSHA's determination that the cotton dust standard was economically feasible rested on the agency's "conclusion that the standard will not put the industry out of business." [28] (Pet. App. 69). In *Lead, supra,* the Court of Appeals further explicated its understanding of the term "economic feasibility." The Court said (per Chief Judge Wright):

> "A standard is feasible if it does not threaten 'massive dislocation' to, *AFL-CIO* v. *Brennan, supra,* 530 F.2d at 123, or imperil the existence of, *American Iron and Steel Institute* v. *OSHA, supra,* 577 F.2d at 836, the industry . . . . More specifically, *Industrial Union Dept., AFL-CIO* v. *Hodgson, supra,* teaches us that the practical question is whether the standard threatens the competitive stability of an industry, 499 F.2d at 478, or whether any inter-industry discrimination in the standard might wreck such stability or lead to undue concentration . . . ." Slip Opinion at 143-44.

We submit that this reading of feasibility is both practically and legally deficient. Practically it fails

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[28] OSHA does recognize that the costs of a given standard are not to be viewed in complete isolation. In its preamble to the lead standard the agency stated its position as follows:

> "Costs from other sources, including other OSHA standards, have been considered in the same manner as any other known costs facing an industry. As such they become part of the economics of the industry from which the likely impact of the lead standard is measured." 43 Fed. Reg. 54494 (Nov. 21, 1978).

As indicated from the quotation from the lead standard case in the text, *supra,* however, the "likely impact" of a proposed OSHA standard sufficient to restrain OSHA is the virtual bankruptcy of the affected industry.

because at a time when American industry cannot tolerate unnecessary additions to its costs, it imposes on OSHA no real obligation to justify the costs of its regulations. Legally it fails because, bankruptcy of the affected industry aside, it furnishes no guidelines for the exercise of OSHA's regulatory discretion.

Of course, it is implicit in the adoption of the OSH Act that the American economy will bear the costs of upgrading the safety and health of the industrial workplace. However, as this Court noted in *Benzene, supra,* 48 USLW at 5033, 34, both the language of the OSH Act and its legislative history make plain that Congress did not wish to confer on OSHA a limitless authority over the American economy.

Just such a limitless delegation of authority is achieved, however, by the construction given to the term "feasible" by OSHA with the approval of the court below.[29] So long as industry bankruptcy is avoided, OSHA is left free to decree whatever changes in the domestic economy it feels may contribute to an improvement in the health or safety of the industrial workplace.

OSHA's lead standard discloses the extent to which such an unbridled discretion can be carried. Compliance with that standard among other things will require the primary lead industry to convert its basic manufacturing processes from a pyrometallurgical technology to a new and unproven hydrometallurgical

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[29] But cf. *Texas Independent Ginners Ass'n* v. *Marshall,* Nos. 78-2663, etc., (5th Cir. Nov. 14, 1980) Slip Opinion 1208, 1225 n. 50:

> "The economic feasibility aspect of the statutory limitation requires that OSHA regulations must be affordable and also must be of practical cost."

technology.[30] OSHA does allow the industry ten years in which to achieve the conversion, but this regulatory magnanimity serves only to underscore the scope of the power asserted. OSHA's justification for the ten-year compliance period is its recognition that the technology to meet the standard exists today in embryonic form only.[31] Thus, the standard requires the industry to invest its capital resources in the pursuit of an unproven technology which OSHA has selected for it and this without any real assurance that the health objective of the standard can be achieved through the new technology.[32]

OSHA's authority to preempt core managerial decisions regarding changing to different manufacturing technologies is directly at issue in the *Lead* case but is not present, as such, in the instant case. OSHA's assertion in *Lead*, on the other hand, of the power to direct the allocation of corporate resources to the pursuit of specific new technologies does bear directly on the cotton dust standard. Indeed, the lead standard takes OSHA's assertion of authority one step farther than the instant case. Here, the expenditures which the standard would require of the industry are, by and large, hygenic in nature (improved ventilation, enclosure of equipment, etc.). In *Lead* the agency claims the power to direct the expenditure of cor-

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[30] 43 Fed. Reg. 54480-82 (Nov. 21, 1978).

[31] *Id.* The Court of Appeals found the ten-year compliance period consoling. It said:

> "OSHA's technology-forcing strategy, and its reliance on embryonic schemes for compliance, are particularly reasonable in the light of such a generous phase-in period." *Lead, supra,* Slip Opinion at 172.

[32] See the Court of Appeals' discussion of the new technology, *id.* at 174.

porate funds in areas—selection of manufacturing technologies for example—that lie wholly outside the agency's statutory competence solely because the agency believes that there *may* be some beneficial side effects from the expenditures.

This is limitless discretion. It is discretion exercised without reference to meaningful guidelines and without the possibility of effective judicial oversight. This is not regulation; it is legislation.

To avoid the constitutional consequences of such a sweeping delegation of power, the Act must be construed to impose realistic limitations on OSHA's feasibility determinations. We believe that this objective is achieved if the agency is required to demonstrate that its standards impose on industry no greater costs than are necessary for the responsible discharge of the agency's regulatory function. This would include a showing that the benefits to be derived from the standard will bear some reasonable relationship to their anticipated costs and that the standard represents a cost-efficient mode of achieving those benefits. The court below explicitly rejected this construction of the Act here (Pet. App. 69-77) and in *Lead, supra,* Slip Opinion at 140, n. 102.

The parties will address the statutory bases for the construction of the Act which they advocate. It suffices to repeat here that the construction placed on the term "feasible" by OSHA and the court below serves neither to restrain OSHA in the selection of health-improvement alternatives nor to provide meaningful guidelines for the exercise of the agency's discretion. Short of industry bankruptcy, OSHA is left free to direct the application of massive corporate resources

to achieve minimal or speculative health gains. Such a construction of the Act raises inescapably those questions of unconstitutional delegation of legislative power foreseen in *Benzene, supra,* 48 USLW at 5032.

CONCLUSION

The unfettered discretion which OSHA has fashioned for itself, with the approval of the court below, to direct the restructuring of whole industries in the name of safety and health raises inescapably the most serious constitutional questions. However, there is nothing in either the terms of the Act or its legislative history or its overall purpose to suggest that Congress intended to confer any such far-reaching authority on OSHA. To the contrary, as this Court observed in *Benzene, supra,* 48 USLW at 5033, 34, there is clear evidence of a Congressional purpose to circumscribe OSHA within reasonable bounds. This goal can be achieved and difficult constitutional questions can be avoided if the Act is read to impose practical and objective limitations on OSHA's economic feasibility determinations.

At a minimum these limits should include obligations to perform cost-benefit and cost-efficiency analyses. Nothing less will suffice to confine OSHA to a regulatory as opposed to a legislative role and to insure that the costs to the American economy of the OSH Act are not wholly disproportionate to the safety and health benefits to be derived from it.

Respectfully submitted,

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